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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 216

THE PEOPLE OF PUERTO RICO,
On Behalf of the Isabela Irrigation Service,
Petitioner,

vs.

UNITED STATES OF AMERICA, et al [Individual landowners],
Respondents.

REPLY BRIEF FOR PETITIONER
IN REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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I.

The Federal Government's Brief in Opposition too narrowly states (*Brief*, pp. 8-9) **petitioner's contention and claim.**

Petitioner's claim,—insofar as the federal government is concerned,—as contradistinguished from the landowner respondents,—is stated in Questions "1" and "2" under the heading "Questions Presented" (pp. 2-3) in our Petition for Certiorari, and in sub-paragraphs "3" to "5" *et seq.* (pp. 15 *et seq.*) under the heading "Petitioner's Position: Errors of the Lower Courts"; and in our "Argument", particularly in the headings to Points I, II, III, and IV (pp. 25-34), and the succeeding Points in our Supporting

Brief. [*And see also the summary of our "Points" contained in the "Subject Index"* (pp. ii-v) *to the Petition and Supporting Brief*].

II.

The Brief in Opposition relies (*Brief*, p. 9) **upon "three answers" to our contentions**; viz.:

(1) The supposed "shift" in the position of The People of Puerto Rico, adverted to in the opinion of the Circuit Court of Appeals (R. 61-62), and mentioned in our original Petition for Certiorari (pp. 12-13), of which nevertheless the Circuit Court of Appeals itself said in its opinion (R. 62; 134 F. (2d), at p. 270), as quoted on page 13 of our original Petition:

> "In view of the fact that *the lower court assumed* by its discussion of the issue *that The People of Puerto Rico did not abandon* its claim of compensation for the right to make future assessments, we shall hereafter give it consideration."[1]

(2) That (*Brief*, p. 10):

> "the claim for loss of future assessments and revenue is foreclosed by the holding of this Court in *Mullen Benevolent Corp.* v. *United States*, 290 U. S. 89, 94-95; see also *United States* v. *City of Buffalo*, 54 F. (2d) 471, 474 (C.C.A. 2), certiorari denied, 285 U. S. 550; 47 Harv. L. Rev. 706."[2]

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[1] In other words, neither the District Court nor the parties while the case was in that court, considered that there was any real "shift" at any time from the essential basis of the claim of The People of Puerto Rico, but only in the suggestion of the *method of calculating the damages*, as was noted on page 13, *supra*, of our Petition for Certiorari.

[2] And see also Respondent's Brief, at pp. 13-14. This is the meat of the Respondent's contention,—insisting upon and attempting to support the lower courts' erroneous misinterpretation and misapplication of this Court's decision in the *Mullen Benevolent Corporation* case. (See also our "Reasons for Granting the Writ", in the Petition for Certiorari (pp. 23-24); and see also *infra*, "IV", pp. 5-12).

(3) That (*Brief*, pp. 10-11):

> "in determining just compensation for the lands taken, the awards were duly enhanced by 'the availability of irrigation' (R. 47, 55). Those awards have been paid into court. They stand in place of the land. * * * . Any contractual claim which The People of Puerto Rico may have had against the property owners must now be asserted against the awards. How the awards are distributed among the various claimants is no legal concern of the condemnor."

Respondent makes this bare statement without any reference to,—or any attempt whatsoever to answer,—what is said on this subject in our Petition for Certiorari ("Questions Presented"; Question "3", pp. 3-5; and "Petitioner's Position: Errors of the Lower Courts", "17", pp. 22-23), and in our Supporting Brief (Point XIV, "The Liabilities of the Individual Landowners of Lands Located within that Portion of the Irrigated District taken over by the Federal Government in these Proceedings"; pp 50-52).

It is believed that what we there said in our Petition and Supporting Brief was at least worthy of an answer from respondent; and that it is, in reality, conclusive in favor of The People of Puerto Rico on this point. Respondent's statement is no answer to it.

As we there pointed out: (1) The individual landowner respondents are still before the District Court and this Court in this proceeding, and the awards to them are still open for reconsideration in the present proceeding; and (2) The allowances to them of enhancements in their awards on account of "availability of irrigation" of their lands (R. 55) *appear not to have been reduced in any way*,—as they plainly should have been by the District Court,—*by any deduction whatsoever on account of their liabilities*,—or those of the lands,—for the payment of their respective proportions of the cost of construction and of maintenance of the irrigation system and of the necessary assessments to defray those costs and to amortize the bonds.

Those liabilities should surely not have been overlooked. It was error in the District Court to do so.

III.

Respondent also says (*Brief*, pp. 11-13) that the claim of The People of Puerto Rico here presented is for compensation for what the Respondent calls "severance damages"; and that since, as Respondent contends, the allowance of what were called the "Tangible Items" stated in the original Answer of The People of Puerto Rico (R. 10-11),—and which, without question, were allowed by the District Court (R. 38) to be paid to The People of Puerto Rico,—included, as the Respondent now contends, two items which were also themselves in reality in the same category of "severance damages",[3] therefore, no further claim for any other injuries of any kind in the nature of "severance damages" can be entertained by the Court, or allowed to this petitioner.

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[3] Viz., the two items:

(1) $16,000 for the cost of about one-fifth of the Aguadilla Canal, which fifth

> "could have been saved if built to feed water for only the lands that now came to be served after diminution of extent of irrigation district through the withdrawal of the land within the site of the Puerto Rican Air Base", (that is to say the stub-end of the Canal, there at those condemned lands, left empty and useless by cutting off the distribution ditches in the lands taken); and

(2) $19,500.00 for:

> "Approximately 13,000 lineal feet of reinforced concrete pipe 12" diameter to be laid along eastern boundary of Reservation, at $1.50 per lineal foot",

which, as pointed out in our Petition for Certiorari (Footnote 10, pp. 19-20), was simply to connect, as the District Court itself states (R. 49), parts of the canal directly severed from each other by the taking of these 592 acres of land by the United States, so as to lead the water in a new course, around, and outside of, the new Military Reservation.

Neither of those items has anything whatsoever to do with reimbursing The People of Puerto Rico for the cost of

The mere statement of this proposition seems to be a sufficient answer to it. *Cf. Mitchell* vs. *United States,* 267 U. S. 341, 344. No claim is made that there was anything, either in the original answer of The People of Puerto Rico stating the claim for these "Tangible Items" (R. 10-11), or in the "stipulation" between the parties, again referring to the "Tangible Items" (R. 29-31, 33-34), or in the District Court's "Order" of February 28, 1942 (R. 34-37) once more referring to them, or in the "Deficiency Judgment" (R. 37-39) directing their payment (R. 38),—or anywhere else in the record,—indicating any intention whatever to estop or bar in any way The People of Puerto Rico from asserting any claim for general damages to its whole integrated "Isabela Irrigation Service" system,—or from asserting any other claim which might be said to fall within the category of "severance damages",—simply because it might be said to be possible to define those two items listed among the "Tangible Items" as being also within the general category of "severance damages".

Suppose those two items were to be considered as "severance damages". *What of it?* They have been expressly denominated by both parties, in the "stipulation" *supra* (R. 30-31, 33) as "Tangible Items", with the express reservation (R. 34) that entry of judgment for their payment,—and acceptance of the payment by The People of Puerto Rico,—shall in no wise affect the prosecution of The People's claim for the "Financial Items". Moreover, on their face, neither of those two items has anything whatsoever to do with the general damages to the whole integrated system, here in question.

IV.

As above indicated, the gist of the whole of Respondent's

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the construction or maintenance of the upper works of the Irrigation System at the full size suitable to the full originally planned area of the irrigated districts,—something entirely outside of, and distinct from, the distribution equipment which had been located on the lands now taken by the Federal Government.

Brief in Opposition really boils down to an insistence that this Petitioner's entire claim here "is foreclosed by the holding of this Court" in the Mullen Benevolent Corporation case (Mullen Benevolent Corp. vs. United States, supra, 290 U. S. 89).

That is the meat of the Respondent's whole contention, as above indicated (*ante*, p. 2; foot-note 2); and, as we have said above, that is simply a repetition and reliance upon the lower courts' misinterpretation and misapplication of this Court's opinion in that case.

A. Our understanding of this Court's decision in the *Mullen Benevolent Corporation* case is stated in Point XI (pp. 40-45) of our original Supporting Brief here. As we said there (pp. 40-41) *the lower courts here misunderstood and misconstrued and misapplied* this Court's opinion in that case, in saying, as the District Court phrased it (R. 49,—approved in substance by the Circuit Court of Appeals, R. 67-68):

> "Insofar as loss of future assessments is concerned, the case is like the loss of bondholders upon condemnation by the United States of lands to which they look for assessments to pay the bonds, **which type of loss has been held to be non-compensable.** (See *John K. and C. Mullen Benevolent Corp.* v. *United States*, 280 U. S. 89)." [Emphasis supplied]

B. That is plainly not the holding of this Court in the Mullen Benevolent Corporation case, where this Court expressly pointed out (290 U. S. at pp. 90-91) that at the time of the federal government's acquisition of the lands for the construction of the American Falls Reservoir,—acquired partly by condemnation proceedings and partly by voluntary deeds from the then owners,—**the federal government carefully paid off and discharged the entire amounts of the original bonds issued under the original ordinances of the village of American Falls to pay for the costs of the construction of all of the contemplated improvements; so that at the time of the completion of the federal government's**

acquisition of the lands on or prior to January 1, 1927, there was no outstanding legal liability or claim or charge of any kind, on the part of anybody, or against any property whatever, for the payment of the balance of the actual costs of the construction of the improvements, or for the payment of the balance of the outstanding bonds, which had actually been *over-issued*, in excess of the amounts of the total assessments provided by the original ordinances.

C. As noted in our original Supporting Brief (p. 42, and footnote 14), the bonds involved in that case contained an express provision that they *did not constitute direct obligations* of the city or of its citizens or taxpayers, in any way.

D. None the less the city authorities,—recognizing that there was a *moral obligation* on their part to provide in some manner, so far as they could, for payment of that excess actual cost of the improvements over their original estimates, and for the excess amount of the bonds representing it,—proceeded, under permissive authority given them by the statutes of Idaho in case of such mistake in such original ordinances,[4] to enact new ordinances [5] to levy what were called "reassessments" on all the property in the districts for the amounts of the deficiencies.

But those "reassessments" were not made until July 3, 1928 (290 U. S. *supra* at p. 91), *more than eighteen months after the date,* January 1, 1927, *of the completion of the acquisition of the property by the United States;* and, because of that fact, it was apparently recognized by all the parties to that case that, as this Court said (*Mullen Benevolent Corp.* vs. *United States, supra,* 290 U. S. at p. 91);

> "But as the land was then owned by the United States, the assessment was a nullity."

E. Under those circumstances, it plainly followed that,

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[4] Idaho Compiled Statutes 1919, Sec. 4024; 290 U. S. *supra,* at p. 93.

[5] Ordinances Nos. 122, 123, and 124, *United States* vs. *Mullen Benevolent Corp.,* 63 F (2d) 48, 49; 290 U. S., *supra,* at p. 91.

as we have said, such of the bonds as still remained outstanding, representing the excess cost of the improvements over the total amounts of the original estimates provided for in the original ordinances of 1915 and 1916, *represented no legal liability or obligation whatever* of the United States on account of the lands which had thus been completely taken over by the federal government, as above stated, more than eighteen months prior to the enactment of the supplemental "reassessment" ordinances Nos. 122, 123, and 124 of July 3, 1928, insofar as concerned those lands, at that time owned by the United States; *and that those reassessment ordinances,* being, with regard to those lands, simply a "nullity", as this Court said of them, *did not affect the situation with relation to the United States in any way at all. It was not simply that those outstanding bonds represented no lien* upon those lands which had been bought by the United States so long prior to the enactment of those reassessment ordinances; but it was that they represented *no kind of legal liability or obligation or duty whatever on the part of the United States* [*or of anyone else*] *of any sort.*

F. Nevertheless, the Mullen Benevolent Corporation which had received some of those bonds (apparently by way of a gift from Mr. Mullen, who had apparently originally purchased them back in 1925), sued the United States under the Tucker Act for the face amount of the bonds and interest, under a theory that the Government was in some way liable for the amount because it had purchased the lands prior to the reassessment, and had thereby in effect deprived the City Council of the power to re-assess them for the deficiencies resulting from the mistaken under-estimate of the sewer and paving costs in the original ordinances in 1915 and 1916,—or had *"frustrated"* the City Council from the exercise of that legislative power. *But it was never claimed,* so far as appears, *that the City Council was under any legal duty or obligation* to exercise the *permissive* power given to it by Section 4024, *supra,* of the

Idaho Statutes,[6] nor that the Council proceeding which resulted in Nos. 122, 123 and 124 *supra* of July 3, 1928 had been in any way formally initiated, at all, prior to the Federal Government's completion of the land purchases "completed prior to January 1, 1927" (290 U. S. *supra,* at p. 91).

G. Upon those facts, this Court ruling against the Mullen Benevolent Corporation's claim, said in affirming the decision of the Circuit Court of Appeals for the Ninth Circuit[7] (290 U. S. *supra,* at p. 95):

> "What has been said shows that the respondent did not take or destroy any lien belonging to the petitioner. None remained upon the land, when the purchases were consummated. The re-assessments were the result of proceedings begun thereafter. They were ineffective to create a lien upon lands owned by the Government. *United States* v. *Buffalo,* 54 F. (2d) 471.
>
> "**The respondent did not expressly contract with the petitioner to make good any unpaid balance on the outstanding bonds. Can an implied contract of that nature be spelled out of the acts of the Government's agents? We think not.** Care was taken to free the lands of all liens, including the assessments then unpaid. **The vendors were under no legal liability at the date of transfer for any future re-assessments.** *United States* v. *Buffalo, supra; Brown* v. *Silverton,* 97 Ore. 441; 190

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[6] This Court said that Section 4024 of the Idaho Compiled Statutes of 1919 (*Mullen Benevolent Corp.* vs. *United States, supra,* 290 U. S. *supra,* at p. 93);

> "Re-assessment on all the property in the district is permitted by Sec. 4024,
>
> > 'Whenever, for any cause, mistake or inadvertence the amount assessed shall not be sufficient to pay the cost of the improvement made and enjoyed by the owners of property in the local assessment district where the same is made', . . .
>
> "It was under this section that the re-assessments were made in the instant case."

[7] *United States* vs. *John K. & Catherine S. Mullen Benev. Corp.,* 63 F (2d), 48.

Pac. 971; *Beezley* v. *Astoria*, 126 Ore. 177, 184; 269 Pac. 216." (*Emphasis supplied*)

H. *It is submitted that that is not at all a general ruling* that,—(as the Circuit Court of Appeals, affirming the District Court, construed it,—and as the respondent now contends),—where in condemnation proceedings a part of an integrated whole property, such as the Isabela Irrigation System in the present case, is taken, there can be no compensable claim for the destruction at the same time,—by means of the taking of that part of the physical property which is actually taken over,—of a valid theretofore existing contract right constituting an integral part of the integrated whole property, a legal liability and charge on irrigated lands taken over from other defendants to the same proceedings, regardless of whether or not such contractual claim or charge may be considered as having been secured by a technical prior "lien" on those lands at the time of the taking.

I. *No such express statement is contained in the opinion. It is believed that the contrary is implied.* If the bonds in that case had really represented any contractual obligation, it is fairly to be inferred that the *Mullen Benevolent Corporation* claim would have been sustained.

J. The gist of the opinion appears to be contained in the words which we have emphasized in the quotation above, which indicate the outstanding distinction between the facts in that case and in the present one; viz., that, in that case, as this Court there pointed out, as above quoted (290 U. S., at p. 95, *supra*):

> "The vendors were under no legal liability at the date of transfer for any future reassessment";

whereas *in the present case the landowners were expressly legally bound for the payment of all the assessments* until the bonds shall have been completely amortized, and thereafter for the maintenance and operation of the irrigation system (Section 29, "Isabela Public Irrigation Law", Act No. 63 of 1919, as amended), and the good faith of The Peo-

ple of Puerto Rico, administrator and trustee of the Irrigation System, is also "irrevocably pledged" for the payment of the bonds (Section 9, Act No. 59 of 1919, as amended.)[8]

V.

A contract right constituting a charge or claim or lien on irrigated lands and being an integral part of an entire single integrated irrigation system, in reliance upon which the system was built and financed and landholders placed their lands within its irrigation district, as is the case with the Isabela Irrigation System here involved, is "property", within the meaning of the Fifth Amendment; and cannot be taken by the government in condemnation proceedings or otherwise without just compensation; at least in any case where any part of the physical property forming the integrated whole is taken, as is the case here.

A. This is firmly established,—ever since the decisions of this Court in *Monongahela Navigation Company* vs. *United States*, 148 U. S. 312, 328-330, 341-345, and *United States* vs. *Grizzard*, 219 U. S. 180, 184, cited in our original Petition for Certiorari and Supporting Brief (pp. 16, 28-29, 30).

B. Since the *Grizzard* case, it is believed that [outside of the decisions of the lower courts in the present case] no case can be found in the federal courts where compensation

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[8] It is true that this Court, in the *Mullen Benevolent Corporation* case, said in one place, while stating the provisions of the bonds there involved and the respective rights of the parties (290 U. S. *supra*, at p. 94):

> "The bonds have no general lien upon the lands in the district and save through the assessment no special lien on any tract";

but in saying that this Court was not discussing any general rule at law, but was simply reciting the Idaho statutes and their meaning as construed by the Idaho Supreme Court in *New First National Bank* vs. *Weiser*, 30 Idaho, 15, 22; 166 Pac. 213.

has been denied to a defendant, a part of whose lands, constituting, as here, a portion of an integrated single property system, including a contractual right as an integral part of the system, has been taken and the contractual right thereby destroyed.

C. In the *Omnia* case (*Omnia Commercial Co.* vs. *United States,* 261 U. S. 502), cited in this Court's opinion in the *Mullen Benevolent Corporation* case *supra* (290 U. S. p. 95), and now relied upon by the Respondent here (*Brief,* p. 10), it was expressly recognized that such a contract right is "property" within the meaning of the Fifth Amendment (at p. 508)[9]; and in that case in affirming the judgment of the Court of Claims denying relief to the *Omnia Company* upon its action against the United States for the consequential damages suffered by it because of the United States having taken over the plant of the Allegheny Steel Company and thus rendered it impossible for that company to carry out its contract with the Omnia Company for the delivery of a large quantity of steel plate to it, this Court, nevertheless recognizing as stated above that the contract was "property" for which "if taken for public use" the Government would be liable, and denying relief to the Omnia Company only because of the consequential nature of its damages and because there was no direct taking of any property from that company, *expressly distinguished* that case (261 U. S., *supra,* at p. 513), and that line of cases where there is no actual direct taking of any physical property, from *Monongahela Navigation Co.* vs. *United States,* 148 U. S. 312 [and the other cases in the line upon which we are relying here],[10] where there is an actual direct taking of some physical property which constituted a part of an integrated

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[9] Citing *Long Island Water Supply Co.* vs. *Brooklyn,* 166 U. S. 685, 690; *Cincinnati* vs. *Louisville & Nashville R. R. Co.* 223 U. S. 390, 400.

[10] Particularly *United States* vs. *Grizzard, supra,* 219 U. S. 180, 183-184; United States vs. C. B. & Q. R. Co. 82 F (2d) 131, 134-137; United States vs. C. B. & Q. R. Co.

whole of which the contractual right likewise constituted an integral part,—as is the case here. This Court said in the *Omnia* case [at p. 513, *supra*]:

> "There is nothing in *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, or in the other cases cited by appellant, which in any way conflicts with what we have said.
>
> "In the *Monongahela* Case the property which was taken was a lock and dam, built by the company, pursuant to the invitation of the United States and the State of Pennsylvania, the latter, in consideration, giving the company a franchise to exact tolls. The franchise, therefore, was not merely a contract in respect of the property taken, but was an integral part of it, and this Court (p. 329) said:
>
> > 'So, before this property can be taken away from its owners, the whole value must be paid; and the value depends largely upon the productiveness of the property, the franchise to take tolls.'
>
> "The lock and dam constituted, in effect, a going concern, whose value was of course affected by what it would produce."

D. In other words, in the *Omnia* case, the *Monongahela* case was distinguished from that case on the very ground that the *Monongahela* case was of the same class of cases as is the present case here at bar; that is to say that in the *Monongahela* case the "franchise",—the contractual right to continue to collect the tolls, was,—like the contractual right and duty of the Insular Government to continue to collect the assessments in the present case for the common benefit alike of all of the landowners in the irrigation districts and of the bondholders, to pay off the bonds and con-

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90 F (2d) 161, 168; *United States* vs. *Wheeler Township*, 66 F (2d) 977, 984-985; *Town of Bedford* vs. *United States*, 23 F (2d) 453, 454-457; as well as *United States* vs. *Miller*, 317 U. S. 369, 376; *United States* vs. *Welch*, 217 U. S. 333, and the other authorities cited in our original Petition and Supporting Brief (pp. 16-17, 23-24, 27 *et seq.*).

tinue the upkeep and maintenance of the whole integrated irrigation system,—a contractual obligation which "*was not merely a contract in respect of* the property taken, *but was an integral part of it*"; and,—as this Court there in the *Omnia* case as above quoted said of the lock and dam with its concomitant contractual franchise in the *Monongahela* case,—

> "constituted, in effect, a going concern, whose value was of course affected by what it would produce."

E. The same distinction between the two lines of cases was also impliedly recognized again in the recent *Powelson* case (*United States ex rel. Tennessee Valley Authority* vs. *W. V. N. Powelson*, No. 3 at the October, 1942, Term of this Court, decided May 17, 1943; at p. 11 of the Opinion).

F. Nor is this a case of a merely inchoate project or of a franchise revocable at the election of the local State [Territorial] authorities, as in the *Powelson* case, or in the earlier case of *Sears* vs. *City of Akron*, 246 U. S. 242, cited in the *Powelson* Opinion.

G. *Nor is this a case of the destruction of a mere privilege or business opportunity*, such as the privilege or opportunity of a telephone company to sell its telephone service to subscribers within its area, as in *Deepe* vs. *United States*, 103 Colo. 294, 86 Pac. (2d) 242, relied upon here by the District Court (R. 49), and likewise by the Respondent now (*Brief*, p. 12); and the other like cases cited by Respondent. (*Joslin Co.* vs. *Providence*, 262 U. S. 668, 675-676; *Mitchell* vs. *United States*, 267 U. S. 341, 345).

A subscriber to a telephone company, for example, is not bound to continue to take the service. He may discontinue his subscription on reasonable notice at any time he sees fit and for any reason,—because of change in his own business, moving his residence, or for any other reason, or for no reason at all, without being liable in damages to the telephone company for the discontinuance. And so likewise, if by condemning the property of a single subscriber, —or of a large number of subscribers—the Government

takes away or injures the telephone company's business opportunity in its area, *there is no destruction of any legal right* of the company, but only of its business opportunity; although that opportunity may have been given in part by the holding of a public franchise. *Such a franchise, giving only a business opportunity* within a specified area, for example, *is clearly a wholly different thing from a contractual franchise* like the right to take tolls for a specified period to amortize the cost of the construction of a bridge (or until the cost is amortized) at a specified rate; or, as in the present case, a contractual right and duty to amortize the cost of construction and provide for the upkeep and operation of the irrigation system.

VI.

No double compensation is being asked by The People of Puerto Rico (Point XII of our original Supporting Brief).

A. Respondent makes no attempt whatever to answer what we said under this point (*Supporting Brief*, pp. 46-49).

Respondent contents itself with merely quoting (*Brief*, p. 14) *the District Court's unsupported observation* in its opinion (R. 50) that:

> "What claimant is asking is that it be paid the fair value of that part of its distribution system located on the land taken, and that it be paid also the cost of constructing another distribution system in a different land area. It is not entitled to both."

B. Specifically, Respondent makes no attempt whatever to reply to what we said in our Supporting Brief with reference to that *a priori* conclusion of the District Court, in that,—aside from all other objections to it,—(*Supporting Brief*, pp. 48-49) it fails to bear in mind (1) that the costs of building a new distribution system today on the same area of land would necessarily be very considerably higher than twelve years ago in the early days of the financial depression, and (2) that the topography of no two tracts of similar acreage can possibly be the same, so that the engi-

neering problem of building a water distribution system on another tract is by no means the same as the problem of building the system on the tract taken in these condemnation proceedings; and that therefore, as we said in our original Supporting Brief (p. 49), and now again respectfully submit:

> "The District Court should therefore have been willing to hear evidence upon it in support of the insular government's contention; and should not have disposed of it summarily by *a priori* reasoning, as it did in the paragraph of its opinion above quoted (R. 50, *supra*)."

C. *The detailed engineering estimates* of the cost of building a countervailing system upon an available area of land of similar acreage, upon which the amount of petitioner's claim for damages was calculated, were ready for presentation to the District Court; and should have been received in evidence and considered by it. It was clearly error to refuse to do so and to jump to the conclusion now relied on by Respondents, above quoted, upon the District Court's own unsupported *a priori* reasoning, without the benefit of inquiry into the actual facts.

VII.

Measure of Damages

A. Respondent makes no reply to what we said under this heading. (Point XIII, *Supporting Brief*, pp. 49-50).

B. As we there said ("D", p. 50), the method of calculating the damages may be on either one of three bases, one of which is the cost of building a countervailing distribution system on an equivalent acreage, as was suggested to the District Court [and which that Court so summarily rejected on its *a priori* reasoning adverted to in the preceding paragraph (*ante*, pp. 15-16)].

C. That method of calculating the damages is supported by the decisions, among others, in the cases in the Seventh and Eighth Circuits,—as well as in the First Circuit itself in the *Bedford* case,—cited and quoted in our original Peti-

tion and Supporting Brief,—the two *Chicago Burlington & Quincy Railroad* cases, and the *Wheeler Township, and Town of Bedford* cases.[11]

In the *Chicago Burlington & Quincy* cases the amount of the damages seems to have been already ascertained and definitely fixed at the time of the hearings in the District Courts, by the work of changing the railroad tracks having already been done, so that the cost was definitely known. But in the *Wheeler Township* and in the *Town of Bedford* cases, the new highways had not yet been constructed, and the damages allowed in each of those cases were fixed upon engineer's calculations of the estimated costs of building them,—just like the estimated costs here of building the countervailing water distribution system on an equivalent acreage of irrigable land.

CONCLUSION

For the reasons stated in the Petition and the Supporting Brief, and above, the Writ of Certiorari should issue; the judgments of the Circuit Court of Appeals and of the District Court should be reversed; and this case should be remanded to the District Court for further proceedings.

Respectfully submitted,

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[11] United States v. C. B. & Q. R. Co. 82 F (2d) 131, 134-137; United States vs. C. B. & Q. R. Co. 90 F (2d) 161, 168; United States vs. Wheeler Township 66 F (2d) 977, 984-985; and Town of Bedford vs. United States, 23 F (2d) 453, 454-457. [For our comments upon these cases see original Petition pp. 16-17, and Supporting Brief, pp. 27-34].